No. 1770.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. CLARK,

Appellant,

vs.

THE ROSARIO MINING AND MILLING COMPANY, a Corporation,

Appellee.

Reply to Appellee's Petition for Rehearing

TOBIN & TOBIN and
F. S. BRITTAIN,
Attorneys for Appellant.

Filed this.....day of April, A. D. 1910.

..... Clerk,

By.....Deputy Clerk

THE JAMES H. BARRY CO.,
1122-1124 MISSION ST.

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REPLY TO APPELLEE'S PETITION FOR REHEARING.

To the Honorable Judges of the Circuit Court of Appeals:

A sense of our duty to the Court rather than any doubt raised in our minds by the appellee's petition for rehearing prompts this short reply. The petition should be denied:

FIRST: Because, with one exception, the views therein expressed were fully presented to and fully considered by the Court when the appeal was submitted for decision.

In such a case, unless a doubt of the correctness of

his former opinion exists in the mind of a member of the Court the petition should be denied.

Sioux City, etc., R. R. vs. *United States,* 160 U. S., 686; 40 Law Ed., 583;
Brown Admr. vs. *Aspden's Admrs.,* 14 How., 25; 14 Law Ed., 311;
United States vs. *Moorehead,* 1 Black., 782; 17 Law Ed., 80;
St. Louis Schools vs. *Walker,* 9 Wall., 603; 19 Law Ed., 650.

SECOND: Because the only new view presented is based upon a misquotation from one of the decisions of Mr. Justice Clifford of the Supreme Court and a misapplication of the cases cited by him.

It will be remembered that in the opinion filed by Judge Dietrich, he interpreted the contract in suit, which he said, "Fairly construed, discloses an intention " to withhold from a complainant the right to require " the defendants specifically to perform." The decree of the Court below rested upon this construction of the contract. Upon any other hypothesis the decree could not in any event have been sustained.

On the appeal, we argued that, since the decree below must stand upon this construction, and since the appellee had not objected to it by a cross-appeal, the appellee was estopped to attack it.

This Court construed the contract as Judge Dietrich had previously determined it. On the petition for re-

hearing both this Court and Judge Dietrich are accused of error. To support this attack, the following appears on page 5 of the petition for rehearing:

"The Supreme Court of the United States in the case " of the *Schooner Stephen Morgan* vs. *Good,* 94 U. S., " 599 (L. Ed., 266), states:

"Parties who do not appeal from a final decree of a " Circuit Court which is regular in form, can not be " heard in opposition to the decree when the cause is " removed here by the opposite party . . . *unless* " *in support of the decree and in opposition to every* " *assignment of error filed by the appellants.*

" *Harrison* vs. *Nixon,* 9 Pet., 494;
" *Canter* vs. *Ins. Co.,* 3 Pet., 318.

"So, while appellee does not object to the decree of " the lower Court, and would be satisfied if the same " was affirmed by this Court, yet we are not precluded " by all or any of the findings of fact or conclusions of " law made by the lower Court in rendering said " decree."

In the report of the case from which the above quotation is said to come the following appears (the italics are ours):

"Parties who do not appeal, from a final decree of " the Circuit Court, which is regular in form, can not " be heard in opposition to the decree when the cause

" is removed here by the opposite party, *unless it ap-*
" *pears that the proceedings in removing the cause were*
" *unauthorized or irregular.* They may be heard in
" support of the decree and in opposition to every as-
" signment of error filed by the appellants."

Schooner Morgan vs. *Good,* 4 Otto, 599, 24 L. Ed., 266.

Mr. Justice Clifford cited *Harrison* vs. *Nixon, Canter* vs. *Ins. Company* and another case, to support the rule that one who did not appeal could not attack any ruling of the lower Court. None of these cases support the contention of the appellee based upon the misquotation.

In addition to the decision of Mr. Justice Clifford and those upon which it is based, there were cited in the appellant's original brief in this Court other cases which declare that one who procures or acquiesces in a ruling can not be heard to object to it and that on appeal the appellee can not object to the ruling upon which his judgment rests.

Bolles vs. *Outing Co.,* 175 U. S., 262;
U. S. vs. *Blackfeather,* 155 U. S., 218;
London vs. *Shelby Co.,* 14 Otto, 766;
Clark vs. *Killian,* 13 Otto, 766;
Chittenden vs. *Brewster,* 2 Wall., 191.

THIRD: Because there is no merit in appellee's contention.

The decision of this Court was based upon the construction of the contract in suit which showed that the right to have specific performance was withheld from the complainant, and that being the case the complainant's only remedy was at law for damages; secondly, that regardless of the construction of the contract in that particular, the contract as an entirety was of such a character as to remove it from the consideration of a court of equity; and, lastly, that whether or not the complainant had perfect title, it had asserted its ownership of title and the defendant had joined issue upon that tender, while the decision showed on its face that no consideration had been given in the Court below to any evidence introduced upon the issue of title.

Under the rule that a rehearing will be denied unless a member of the Court expresses doubt as to the correctness of his former decision, it can hardly be supposed that after the briefing, argument and consideration of this appeal any member of the Court will be disposed to doubt the correctness of his conclusions on both of the first two points as well as on the last.

If a majority of the members of the Court are satisfied that their conclusions are incorrect as to both of the first two points, then, it is submitted, the decree appealed from would have to be reversed and the case remanded for retrial upon the issue of title.

If a majority of the members of the Court adhere

to the conclusions which they reached after consideration, that the contract was unfair and iniquitous, then, whether the legal construction placed on the contract by Judge Dietrich and this Court was correct or not, the decision rendered by this Court would not be affected.

If the appellee is bound by the decision of Judge Dietrich upon the legal effect of the contract, and we submit that it is, then, it is immaterial whether the contract as an entirety was inequitable or not.

The appellee not only failed to appeal from the decision of Judge Dietrich upon the construction of the contract but in the petition for rehearing filed on its behalf it is asserted that the "appellee does not object " to the decree of the lower Court and would be sat- " isfied if the same was affirmed by this Court" (Petition for Rehearing, page 5).

The judgment below was based on Judge Dietrich's construction of the contract. If that construction was correct, the Circuit Court had no power to render the judgment on the money demand. Since the appellee is satisfied with the construction placed on the contract, its objection is only to the legal consequences of it. The appellee does not question these legal consequences, but to evade them it seeks, at this late day, to attack the construction of the contract as determined by the Court below and by this Court. In other words, it says, in effect: "The legal construction of the contract was correct—if this Court will affirm the judgment regard-

less of the lack of power in the Court below, but the legal construction of the contract was wholly wrong,—if this Court shall apply the rule that courts of equity are without jurisdiction of simple money demands."

Upon the question of the correctness of the construction placed upon the contract numerous cases are cited in support of the rule that to warrant specific performance both parties must be bound. This is exactly the rule upon which this Court determined that the contract in suit by its terms was beyond the cognizance of a court of equity.

The question in regard to mutuality has usually arisen where a defendant in a suit for specific performance has asserted that the plaintiff had no right to the equitable intervention of the Court because at the time of suit filed the defendant could not have sued for specific performance.

So far as we have been able to discover this is a rule never invoked by the complainant, but always by the defendant, and, in all of the cases where the matter has been discussed at length an exception is noted in regard to those cases where the right to have specific performance is by the contract given to one of the parties and withheld from the other, as for instance, in the case from which the following is quoted:

"This agreement does not come within the decisions "which hold that an agreement to entitle to specific "performance must be mutual and such that the de-

" fendant could have had that remedy. These decis-
" ions themselves are controverted and conflicting. But
" that does not apply to a case where the complainant
" has paid a part or the whole of the consideration or
" a consideration for the defendant signing the agree-
" ment, or to cases of leases for years with the option
" to purchase during the time, or *to cases where the*
" *contract by its terms gives to one party a right to the*
" *performance which it does not give to the other.*"

Green vs. *Richardson,* 23 N. J. Equity, 32-35;
Van Doren vs. *Robinson,* 1 C. E. Green, 256-259.

In an attempt to show that the contract was fair and equitable, in the petition for rehearing it is asserted that there were two distinct agreements in the contract in suit, and to support the contention of the appellee certain specific portions of the whole contract are culled to make an agreement upon which suit was never brought and into which the parties never entered. A portion of the remaining parts of the contract in suit were incorporated in another supposed agreement which it is now asserted has no connection with the matters involved in this suit.

Any one reading the entire contract in suit would recognize that the provisions of the so-called second agreement constituted the consideration for the so-called first agreement and that these conditions lack that mutuality which the appellee insists must exist. It fol-

lows, therefore, there was no consideration for the first agreement.

It is idle, however, to go into any very extensive examination along these lines since the Court has looked and will look at the entire contract and not at specific portions of it only. This rule was clearly announced by Mr. Justice White speaking for Supreme Court in 1897 in a case where it was claimed that a certain clause of a contract was clear and free from objection:

"The confusion of thought consists in failing to dis-
" tinguish between the contract as a whole and some
" of the words found therein. If the erroneous theory
" were the rule, then in every case it would be impossi-
" ble to arrive at the meaning of a contract in the event
" of difference between contracting parties, since each
" would select particular words upon which they re-
" lied, and thus frustrate a consideration of the whole
" agreement. *The elementary canon of interpretation*
" *is, not that particular words may be isolatedly con-*
" *sidered, but that the whole contract must be brought*
" *into view and interpreted with reference to the nature*
" *of the obligations between the parties, and the inten-*
" *tion which they have manifested in forming them.*"
(Citing authorities.)

O'Brien vs. *Miller,* 168 U. S., 287; Law Ed., 469-473.

The fallacy spoken of in this decision is the one that underlies the entire argument of the appellee.

It is respectfully submitted that the decision rendered by this Court on appeal is correct and that the appellee's petition for rehearing should be denied.

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F. S. BRITTAIN,
Attorneys for Appellant.